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Nos. 91-790 and 91-1206

IN THE

Supreme Court of the United States

October Term, 1992

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZY BEATRICE EASTERWOOD,
Respondent,

LIZZY BEATRICE EASTERWOOD,
Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT/ CROSS PETITIONER EASTERWOOD

Roxanne Barton Conlin, Esq.
Jeffrey Robert White, Esq.
Association of Trial Lawyers of America
1050 31st St., N.W.
Washingrton, DC 20007
(202) 965-3500

Priscilla Budeiri, Esq.
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C
1625 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 797-8600

Dale Haralson, Esq.*
Adam Levine, Esq
HARALSON, KINERK & MOREY, P.C.
28 South Stone Ave.
Tucson, Arizona 85701
(602) 792-4330
Attorneysfor Amici Curiae
**Counsel of Record*

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BRIEF OF AMICI CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA TRIAL LAWYERS FOR PUBLIC JUSTICE SUPPORTING RESPONDENT/CROSS PETITIONER EASTERWOOD

INTEREST OF THE *AMICI CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 65,000 members primarily represent injured plaintiffs, including those injured in railroad highway grade crossing collisions.

Trial Lawyers for Public Justice, P.C. ["TLPJ"], is a national public interest law firm that represents victims of corporate and government misconduct n precedent-setting

and socially significant litigation. Supported by and utilizing the skills of nearly 1300 trial lawyers nationwide, TLPJ is dedicated to the preservation of the states' individual tort systems as the surest, and often sole, means to compensate injury victims.

ATLA and TLPJ are particularly interested in this case because resolution of whether the Federal Railroad Safety Act preempts state tort law may determine whether thousands of innocent victims obtain compensation and whether wrongful conduct by our country's railroads will be deterred.

The importance of this Court's decision cannot be overstated. There are approximately 174,000 public railroad-highway grade crossings in the United States. The past ten years saw more than 6,000 deaths and 24,000 injuries in public grade crossing accidents. ATLA and TLPJ submit that the position advanced by CSX and its supporting amici misinterpret the provisions of the FRSA and misapply the basic tenets of the preemption doctrine. Adoption of that position would increase the carnage resulting from railroad-highway grade crossing accidents and deprive the victims of such accidents of any remedy or compensation at law.

Letters have been filed with the Clerk of the Court reflecting the parties' consent to the filing of this brief.

SUMMARY OF ARGUMENT

Congress enacted the the Federal Railroad Safety Act, 45 U.S.C.A. § 421 *et seq.* to impart a degree of national uniformity to railroad safety regulations. The question before this Court is whether Congress also intended to deprive victims of grade crossing accidents, such as Mrs. Easterwood, of the right to seek compensation for tortious injury under state law.

This Court has emphasized that there is a strong presumption against preemption of state law, particularly state tort law. This Court has further held that express preemption provisions shall be narrowly construed.

It is clear that Congress intended the express preemption provision in the FRSA affect only positive enactments of state legislatures and state regulatory agencies. Congress did not intend to eliminate state tort liability, which exerts only indirect regulatory influence.

Even if tort law were deemed to be within the scope of the preemption provision, preemption of state law liability for negligent crossing design has not been triggered under the terms of the statute. The Secretary of Transportation has not promulgated regulations concerning adequate warning devices at grade crossings. The regulations identified by CSX were not adopted pursuant to the FRSA and do not address railroad safety: They are simply a federal funding program offering financial assistance to states to improve grade crossings. In addition, the Manual of Uniform Traffic Control Devices does relieve railroads of their common-law responsibility for crossing safety. Nor does it divest the states of their police power to regulate safety at grade crossings.

Similarly, the federal government does not set speed limits for trains. Federal track class/speed regulations are merely technical standards relating to the physical condition of railroad tracks. The Federal Railroad Authority has clearly designated these as *minimum* safety standards. They do not prohibit states from imposing on railroads the duty to exercise reasonable care in the speeds at which they operate their trains.

Moreover, regardless of any regulations promulgated by the Secretary, Congress explicitly exempted from preemption state regulations that address "an essentially local safety hazard." Railroad highway grade crossings are local hazards

by their very nature. Imposing a duty of due care under the circumstances at various grade crossings with respect to warnings and train speeds clearly falls within this exception.

Finally, preempting state tort liability for inadequate regard to grade crossing signalization and excessive train speed would remove all incentives for the railroads to exercise reasonable care and leave thousand of accident victims without any remedy. There is no indication that Congress intended such a result. The strong presumption against the preemption of state tort remedies compels the rejection of attempts to supply congressional intent that was not clearly stated by Congress.

ARGUMENT

I. THE FEDERAL RAILROAD SAFETY ACT WAS NEVER INTENDED TO PREEMPT STATE COMMON LAW TORT LIABILITY.

A. Preemption Analysis Begins With A Strong Presumption Against Preemption And Requires Unambiguous Congressional Intent.

In determining whether federal law preempts state law, a court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Preemption of state law is not to be found absent an "unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963). Preemption analysis must "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the

courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Caution in displacing state law is justified because Congress certainly has the power to "act so unequivocally as to make it clear that it intends no regulation but its own." *Rice*, 331 U.S. at 236. If any doubts exist as to congressional purpose, this Court should be slow to find preemption because the states will be powerless to remove any ill effects occasioned by the preemption of their laws, while the national government, which has the ultimate power, remains free to remove any burden. *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, 276 (1943). Moreover, "[t]he presumption against pre-emption is even stronger against pre-emption of state remedies, like tort recoveries, when no federal remedies exist." *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988).

Congressional intent to preempt state law may be "explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, *supra* at 525. This Court has recently explained that the presence of an express preemption provision eliminates any need to resort to implied preemption. Where "Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority ... there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). Accordingly, this Court "need only identify the domain expressly preempted" by the statutory language and narrowly construe its terms "in light of the presumption against the preemption of state police power regulations." *Id.*

B. The Federal Railroad Safety Act Expressly Preempts State Law Only Where The Secretary Of Transportation Has Regulated The Same Subject Matter And Expressly Preserves Those State Laws Necessary To Eliminate Local Safety Hazards.

The FRSA was enacted by Congress for the purposes of "promoting safety in all areas of railroad operations" and to permit the establishment of nationally uniform regulations and standards. 45 U.S.C.A. § 421 *et seq.*; H.R. REP. NO. 1194, 91st Cong., 2nd Sess. 11, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS, 4104, 4105-4108 (hereafter "HOUSE REPORT"). The FRSA provides a comprehensive regulatory scheme to achieve this goal and vests the Secretary of Transportation with authority to "prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety." 45 U.S.C.A. §431(a).

The extent to which states would be permitted to regulate rail safety apart from the FRSA was vigorously debated by Congress. *See Railroad Safety and Hazardous Material Control: Hearings on H.R. 7068, 14417, 14478 and S. 1933 Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce*, House of Representatives, 91st Cong., 2nd Sess. p. 32 (1970)(hereafter "*Subcommittee Hearings*"). Ultimately, a compromise was reached which Congress believed would result in national rail safety regulations while preserving those elements of state law which were conducive to promoting rail safety. Accordingly, the FRSA contains an express preemption provision which provides:

> The Congress declares that all laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to enforce any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a

> rule, regulation, order, or standard covering the subject matter of such state requirement. A State may adopt or continue to enforce an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C.A. § 434.

This provisions is notable for the narrow scope of the express preemption mandated by Congress. This section explicitly preserves a state's power to regulate rail safety until such time as the Secretary exercises authority under § 431 to regulate a specific area. Additionally, § 434 preserves state law *even where the Secretary has invoked the authority to promulgate rail safety regulations under § 431.and intends to preempt state law to the contrary* where state regulation is "necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Section 434 of title 45 is an express statement of congressional intent to preempt state law. Accordingly, this Court "must fairly but -- in light of the strong presumption against preemption -- narrowly construe its precise language." *Cipollone*, at 2621. In contrast, CSX urges this Court to dispense with a narrow construction of § 434 in order to find common-law tort actions encompassed within the language of the statute. According to CSX, the presumption against preemption should yield to the perceived breadth of the language "any law . . . relating to railroad safety." However, both the language and scope of § 434 must

be evaluated within the context of the FRSA's legislative history. *Cf. Cipollone*, at 2619 n.16.

The legislative history reveals that the motivating force behind the FRSA was a need to address the patchwork of state and federal regulations covering such diverse subjects as track construction and performance, roadbed, rolling stock, design, construction, signal systems, maintenance, and employee qualification and training. *See* HOUSE REPORT at 4108; *Subcommittee Hearings* at 23 (letter of Secretary of Transportation John A. Volpe), & 26 (Statement of Hon. Ogden R. Reid). Viewed within this context, it is clear that the phrase "laws, rules, regulations, orders, and standards relating to railroad safety" in § 434 was not intended to encompass state common law tort actions. Rather, Congress merely sought uniformity among the positive enactments of state legislatures and regulatory agencies which impacted directly upon the safety of railroad operations. "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). While common-law damage actions may impart an indirect regulatory effect upon a party's behavior, *see Cipollone*, *supra* at 4712 (Blackmun, J., concurring in part, dissenting in part), such indirect influence was never identified by Congress as inimical to rail safety or incompatible with the goals of the FRSA.

CSX and its supporting *amici* have rely upon language from the legislative history of the FRSA indicating that Congress did "not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." HOUSE REPORT at 4108. Amici submit that citation to this passage for the proposition that § 434 preempts state tort liability lifts Congress' language entirely and misleadingly out of context. The quoted passage appears in a section of the HOUSE REPORT entitled "The Role

of the States and Rail Safety" and has absolutely nothing to do with the preemption provisions of the FRSA. Rather, this language relates to the debate over the proper role to be played by the state regulatory commissions in the enforcement of *federal* regulations. *See* 45 U.S.C.A. §§ 435 and 436. Viewed in context, it is clear that Congress was referring only to the problems associated with different state regulatory agencies imposing fines for violating federal regulations. This quote, which has been widely misconstrued by lower courts in order to find unwarranted preemption of tort liability, was never addressed to the issue of whether states may continue to regulate rail safety apart from the FRSA and provides no basis for extending federal preemption to common law tort actions.

The legislative history of the FRSA conclusively reveals that Congress envisioned the continuing viability of state common law damage actions. According to the report of the Senate Commerce Committee accompanying S. 1933 (the original form of the Act):

> This bill contains no provision prohibiting the use of accident reports as evidence in any action for damages. The committee intends that individuals have access to such reports for the purpose of assisting them in any cause of action growing out of an accident. The committee notes that quite often the injured party's situation is such that without benefit of governmentally developed information the party would be unable to produce sufficient evidence to prove his case.

SENATE REPORT No. 91-619, Dec. 18, 1969 at p. 12.

When Hearings on S. 1933 were later conducted before the House Subcommittee on Transportation and Aeronautics, the subject was raised again by Secretary of Transportation

John A. Volpe. *See Subcommittee Hearings* at p. 32. Ultimately, Congress chose to address this issue outside of the FRSA and has implemented a statutory ban on the use of certain reports in tort actions. *See* 23 U.S.C. §409. If common law damage actions with regard to rail safety were preempted by the FRSA, 23 U.S.C.A. § 409 would be superfluous. Congress is presumed to understand existing law when it legislates, *Bowen v. Massachusetts*, 487 U.S. 879, 880 (1988), and the fact that Congress felt compelled to address this issue, both in the legislative history of the FRSA, and in subsequent legislation under 23 U.S.C.A. § 409, is convincing evidence that common law actions for damages are not preempted under the language of § 434.[1]

While the briefs of CSX and *amicus curiae* Association of American Railroads disparage jury damage awards as "subjective," "retrospective," "uncoordinated," and "*ad hoc*," Congress itself has expressly sanctioned the use of fault-based jury awards to compensate railroad employees injured on the job as a result of a railroad's negligence. *See* Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51 *et seq.*; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1959). A determination that the phrase "law, rule, regulation, order, or standard" as used in § 434 encompasses state common law damage actions would lead to the bizarre result that a railroad employee injured in a grade crossing collision caused by

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[1]Under earlier proposed drafts of the legislation, existing rail safety statutes, "as well as outstanding orders rules, regulations, standards, requirements and permits," were to be repealed and their substantive safety requirements continued in effect as regulations of the Secretary. *See Subcommittee Hearings* at p. 23 (letter from Secretary Volpe to Hon. John W. McCormack, Speaker, U.S. House of Representatives). This proposal, ultimately rejected, was criticized on the grounds that it would eliminate the principle of negligence *per se* in damage actions and that the substantive requirements adopted in regulatory form would only be standards against which negligent conduct might be measured. *See Subcommittee Hearings* at 177 (Statement of Al H. Chesser).

a railroad's negligence would be entitled to seek compensation under common-law tort principles, while a private citizen suffering the same injuries in the same crash due to the same negligence would be without remedy. There is no indication that Congress intended such an anomaly.

While the nation's rail system is unquestionably important to interstate commerce, other modes of transportation, including air travel, highway traffic, and maritime commerce, are also subject to congressional regulation. In no instance has Congress relieved a provider of transportation of the requirement of due care under the circumstances to avoid causing injury. The FRSA does not authorize railroads to operate without regard for the lives and property of others. Indeed, requiring railroads to exercise reasonable care serves to advance the congressional purpose of the FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C.A. §421.

II. CONGRESS HAS NOT ADOPTED ANY COMPREHENSIVE APPROACH TO GRADE CROSSING SAFETY INTENDED TO PREEMPT STATE LAWS.

Even if the provisions of 45 U.S.C.A. § 434 could plausibly be construed to encompass common-law damage actions, such suits would still not be preempted. The Secretary of Transportation has not promulgated any regulations covering the subject matter of adequate warning devices for railroad-highway grade crossings. The plain language of § 434 makes such action by the Secretary a condition precedent to preemption.

What CSX identifies as a "prospective-looking regulatory scheme" consists merely of the highway funding

provisions of the Federal-Aid program, 23 U.S.C.A. § 101 *et seq*. They cannot be viewed, as CSX argues, as a comprehensive scheme that "covers the subject matter" of railroad-highway grade crossing safety by conscripting state agencies and delegating to them duties which the railroads, in the exercise of due care, might otherwise be obliged to obey.

A. The Grade Crossing Signal Regulations Adopted Under the FRSA Do Not Preempt State Laws.

CSX's entire theory of preemption is premised upon the erroneous notion that the federal program which dispenses federal highway funds to the states is encompassed within the express preemption provisions of the FRSA. This is simply incorrect. The FRSA is a distinct, complete, and self contained regulatory scheme which does not require cross-wiring with other congressional programs.

In order to facilitate the FRSA's ultimate goal of rail safety, the Secretary of Transportation has authority to determine which, if any, areas of rail safety are in need of national uniformity, and prescribe such nationally uniform regulations and standards. 45 U.S.C.A. § 431(a). These regulations and standards preempt state laws and regulations covering the same subject matter unless necessary to eliminate a local safety hazard. 45 U.S.C.A. § 434. This authority to promulgate preemptive regulations and standards was subsequently delegated to the Federal Railroad Authority [hereinafter "FRA"]. *See* 49 C.F.R. § 1.49(m).

The FRA has not mandated nationally uniform regulations governing the selection of appropriate warning devices at railroad-highway grade crossings. Rather, in response to a 1988 amendment to the FRSA, 45 U.S.C.A. § 431 (q), the FRA has promulgated regulations addressing only the maintenance, inspection and testing of grade crossing warning devices. *See* 49 C.F.R. § 234 *et seq*. The grade crossing signalization regulations enacted by the FRA require

railroads, under penalty of civil and criminal sanction, to report all accidents involving grade crossing signal failures, file with the FRA information regarding circuit type and component age for all active rail-highway grade crossing signal systems, and provide the FRA with a current rules and procedures for inspecting and maintaining such systems.

The duty imposed by state common law is one of reasonable care in providing adequate warning of the approach of its trains. Accordingly, the regulations adopted by the FRA at 49 C.F.R. § 234 *et seq*. clearly do not address the subject matter which is the focus of Mrs. Easterwood's tort claim. This conclusion is supported by the FRA's prefatory comments in the Federal Register:

> This action has been analyzed in accordance with the principles and criteria in Executive Order 12612, and it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

"Federalism Implications," 56 Fed. Reg. at 33728.[2]

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[2]Executive Order Number 12612, issued by President Ronald Reagan October 26, 1987, reaffirms fundamental principles of federalism and directs executive branch departments and agencies authorized to issue preemptive regulations to minimize any preemption of state law. Section 4(c) of this Order mandates that any required preemption of state law "shall be restricted to the minimum level necessary". Additionally, section 6 requires any Executive branch actions with sufficient federalism implications to be accompanied by a "Federalism Assessment". This Assessment must identify the extent to which any regulations would "affect the State's ability to discharge traditional government functions". *See* § 6(c)(4). Common law tort remedies have long been recognized by this Court as such a traditional state function. See *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977).

This Court has emphasized that federal regulations will not be deemed to preempt state law unless the issuing federal agency expressly declares its intent. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985). The regulations at 49 C.F.R. § 234 constitute the *only* action taken to date by the FRA with regard to grade crossings. In light of the limited subject matter addressed, and the "Federalism Implications" noted by the FRA in the Federal Register, there is no basis for CSX's assertion that the Secretary has covered the subject matter of the selection of grade crossing warning devices.

B. Federal-Aid Funding For Grade Crossing Improvements Does Not Preempt State Law Under the FRSA.

Because the FRA grade crossing regulations at 49 C.F.R. § 234 do not preempt state common law tort liability, CSX is forced to argue that an assortment of statutes and regulations addressing federal funding assistance to state highway programs collectively constitutes regulation of the "subject matter" of grade crossing signalization for purposes of 45 U.S.C.A. § 434. However, this argument is based upon the erroneous premise that regulations issued by agencies other than the FRA, and deriving their authority from legislation other than the FRSA, can preempt state laws under the express preemption provisions of the FRSA.

What CSX has mistaken for a prospective scheme designed to replace tort liability is nothing more than the program of federal assistance to state highway programs which has been extended to fund railroad-highway grade crossing improvements. This program resulted from the Secretary of Transportation's REPORT TO CONGRESS - RAILROAD HIGHWAY SAFETY PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM and PART II - RECOMMENDATIONS FOR SOLVING THE PROBLEM (hereafter "REPORT TO CONGRESS") which concluded that the best

approach to grade crossing safety was through increased federal assistance to state programs to upgrade or eliminate crossings. *Id.*, PART II at 107-108.[3]

Following the Secretary's recommendation, Congress chose to include railroad-highway crossing improvements as an aspect of highway construction in order to make federal funds available. To receive these funds, a state must set up a hazard ranking system for grade crossings which will prioritize funds for those crossings posing the greatest danger. *See* 23 U.S.C.A. § 130.

CSX erroneously relies upon the Manual on Uniform Traffic Control Devices ["MUTCD"], adopted by the Federal Highway Administration ["FHWA"] under 23 C.F.R. §§ 646.214 and 655.603 as the national standard for all projects in which federal-aid funds participate. Part VIII states:

> The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD at § 8A-1.

According to CSX, this language divests the states of their police power over grade crossings, and cloaks the local agencies of the states within a mantle of federal authority to determine appropriate grade crossing signalization. Because local authorities make the decision regarding crossing signals on behalf of the federal government, CSX concludes that

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3 The REPORT TO CONGRESS was jointly authorized under the FRSA, 45 U.S.C.A §433(a), and the Federal Highway Safety Act, 23 U.S.C.A. § 322(a)(subsequently repealed).

railroads have no corresponding responsibility in this area and cannot be held liable under common law.

Neither the quoted language of the MUTCD, nor the means of its adoption, supports CSX's position. The MUTCD is an engineering manual drafted through the coordinated efforts of federal and state traffic engineers under the supervision of the FHWA. It has existed in one form or another since 1935. While the MUTCD sets forth the physical specifications for traffic control devices and their use, and includes a section addressing grade crossing signalization, it does not prescribe substantive standards for determining whether an active warning device, or any other form of signalization, is required at a particular crossing. In fact, the MUTCD specifically states that this determination constitutes an engineering judgment beyond the Manual's scope. MUTCD § 1A-4. Accordingly, the MUTCD specifically avoids setting forth substantive standards governing the decision that a particular form of crossing device is required.

The MUTCD language which refers to "public agencies with jurisdictional authority" is purely descriptive and does not evidence any intent to alter a railroad's responsibility at common law. CSX has wholly misinterpreted this passage. It does not relate to the duty to ascertain the need for grade crossing protection. It merely recognizes that the authority to regulate railroad-highway grade crossings has always been part of the state's police power under our federal system. This same police power permits states to impose on railroads responsibility for grade crossing safety. A railroad may propose or install at its own expense warning devices beyond those required by local regulatory authorities, and failure to do so may constitute a breach of reasonable care. *See, e.g., Southern Ry Co. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga.App. 1988); *Lloyd v. Southern Pac. Co.*, 245 P.2d 583,

590 (Cal.App. 1954).[4]

There is no reference to this asserted delegation, so essential to CSX's preemption argument, in any statute, regulation, legislative history or government report. The 1971-72 REPORT TO CONGRESS which proposed the § 130 funding program did not recommend that a federal scheme based upon prioritization be implemented under the FRSA to replace tort liability, or suggest that local agencies operating under color of federal authority relieve railroads of their common law duties. Rather, the REPORT reveals that the states may "legally and constitutionally require the railroads to bear the entire responsibility" for grade crossing safety, PART I Appendix A at A-31, and notes that a railroad may be held liable for damages even where the MUTCD is complied with. *Id.* at 62-63.

In 1989, the U.S. Department of Transportation issued the RAIL-HIGHWAY CROSSING STUDY which updates the REPORT TO CONGRESS and details both the history and nature of the § 130 funding program. This study clearly reveals that railroads are responsible for signalization at grade crossings (p.3-4) and that liability may be imposed upon railroads for grade crossing accidents (pp. 3-1, 7-5). Nothing in the Study supports the notion that the federal-aid program was intended to replace common-law damage actions or that the MUTCD in any way alters the traditional role of the states.[5]

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[4] The brief of *amicus curiae* United States has similarly characterized the language of the MUTCD as merely descriptive and rejected any notion that the MUTCD relieves the railroads of any common law duty to provide for a safe grade crossing.

[5] It should be noted that the entire MUTCD/preemption scheme advocated by CSX would constitute an unconstitutional infringement upon state sovereignty under the principles recently set forth by this Court in *New York v. United States*, 112 S.Ct. 2408 (1992). The Secretary of Transportation cannot force the states, or the "public agency with jurisdictional authority" which is an agent of the state, to enact or administer a federal regulatory program. If the federal government desired to regulate the selection of crossing signalization, it must do so itself, or encourage the states to do so through the use of incentives. It may not, however, force the states to do so through the preemption language in 45 U.S.C.A. § 434. *See* 112 S.Ct. at 2435.

Neither the MUTCD, nor any other regulation relied upon by CSX, was adopted by the FRA pursuant to its authority under 45 U.S.C.A. § 431. Rather, these regulations were adopted by the FHWA to supervise the use of federal-aid funds. The FHWA has been delegated the Secretary's authority to approve state highway safety programs and to establish prerequisites for federal funding. 23 U.S.C. §§ 109 and 402; 49 C.F.R. §§1.48(b)(8) and 1.48(n). CSX is simply incorrect when it asserts that the FHWA has been given authority to promulgate regulations implementing the Secretary of Transportation's responsibilities for grade crossing safety under the FRSA. The FHWA's role is limited to participating in a coordinated effort to study and solve the problem of grade crossing safety, 45 U.S.C.A. § 433(b) and 49 C.F.R § 1.48(o), and there are no grounds for elevating such FHWA regulations to the same status as regulations promulgated by the FRA directly under the FRSA.

CSX argues that regulations adopted by the FHWA pursuant to its delegated authority over federal highway funding preempt state laws under 45 U.S.C.A. § 434 by virtue of the fact that the regulations were adopted by the Secretary and relate to rail safety. This argument fails to distinguish the two differing delegations of the Secretary's authority under 49 C.F.R. §§ 1.48 and 1.49. In fact, the regulations under title 23 C.F.R. do not relate to rail safety at all, but rather to the use of federal highway funds. This fact is made amply clear by the 1989 RAIL-HIGHWAY CROSSINGS STUDY which describes the role of the federal government in crossing improvement programs as "overseer to ensure that federal dollars are appropriately spent." At 3-2.

It would set a dangerous precedent to hold that regulations adopted separately and apart from the FRSA were intended to preempt state laws through the FRSA's express preemption provisions. In contrast to regulations adopted by the FRA under 45 U.S.C.A. § 431, regulations adopted by other bureaus and agencies within the Department of Transportation are not the result of a considered determination that national uniformity would be consistent with the FRSA's fundamental goal of railroad safety. Affording such regulations the same preemptive effect as regulations promulgated by the FRA would result in preemption of state law which was neither contemplated nor desired, and in turn, upset principles of federalism by displacing state law without the clear and unambiguous intent of the issuing federal agency.[6]

Finally, CSX's vision of a "prospective looking" preemptive scheme based upon § 130 prioritization of federal-aid funds overlooks the basic fact that participation in the federal-aid scheme is not mandatory. "A state is constitutionally free to operate its own highway system" and need not participate in the federal-aid system. State of *Nebraska, Dept. of Roads v. Tiemann*, 510 F.2d 446, 448 (8th Cir. 1975). In fact, Congress has explicitly re-affirmed state sovereignty under the federal-aid program stating:

> The authorization of the appropriation of federal funds or their availability for expenditure under this chapter, shall in no way infringe on the sovereign rights of the states to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted state program.

23 U.S.C. § 145.

A state which applies for federal-aid funds does not thereby implicitly surrender its sovereignty over highways or grade crossings within its borders. While Congress may attach conditions to federal-aid highway funds, "it must do so unambiguously . . ., enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole*, 483 U.S. 206 (1987). Assuming that Congress could attach conditions on federal-aid which would preempt common law damage actions, the Eleventh Circuit astutely observed that Congress did not do so in this case. *Easterwood*, 933 F.2d 1548, 1555.

Nothing in the federal scheme of providing financial aid to state highway programs reflects an effort on the part of Congress to deprive the states of their power to regulate or address grade crossing safety. As the Eleventh Circuit noted, there are no preemption clauses in any of these statutes, nor do they purport to draw upon the FRSA in that regard. 933 F.2d at 1555. Any conformance to a national scheme is wholly voluntary and arises by virtue of the fact that the federal government imposes certain requirements upon the states as conditions for federal funding. 23 U.S.C. § 109(e), §130, and §402. Within these broad guidelines for supervision, states are free to exercise their state highway programs as they see fit, subject to loss of federal funds for non-compliance with the requirements of the federal-aid system. *See* 23 C.F.R. §§ 1.9 and 1.36; *State of Nebraska Dept. of Roads v. Tiemann, supra*; *State Ex rel Secretary v. Matthews Realty Co.*, 514 A.2d 1123 (Del. Super. 1986).

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6 Accordingly, the position taken by *amicus curiae* United States that preemption is limited to only those crossings actually improved with federal funds and meeting the warning requirements of 23 C.F.R. § 646.214(b) should also be rejected. As with the regulations adopting the MUTCD, the provisions of § 646.200 *et seq.* only provide guidelines for the use of federal highway funds. However, there is no indication that these regulations were issued by the FHWA with the intent of establishing a nationwide standard of care or prohibiting a railroad from taking additional precautions where a reasonable person would do so. *See Restatement (Second) of Torts § 288 C.*

Careful scrutiny of the FRSA, the federal-aid statutes, and the MUTCD reveals CSX's description of this purported statutory scheme for what it truly is -- an aggregation of federal statutes and regulations stitched together by an erroneous application of the preemption doctrine. CSX attempts to mix elements of two separate legislative acts in order to argue that the field of grade crossing safety has been covered. However, because Congress has included within the FRSA an express preemption provision, it is not appropriate "to infer congressional intent . . . from the substantive provisions" of the federal-aid scheme. *Cipollone*, *supra* at 2618. Similarly, there is no authority for CSX's resort to regulations governing federal-aid under the FRSA as a basis for preemption of state law under 45 U.S.C.A. § 434.

Both Congress and the Executive Branch agencies are capable of speaking with drastic clarity whenever they choose to assert their full federal authority and preempt state law. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947); *Hillsborough*, *supra* at 718. If Congress and the Secretary of Transportation intended to utilize the FRSA in conjunction with the federal-aid statutes to abolish state tort liability at grade crossings, and substitute in its place a system of funding prioritization wherein the states, and not the railroads, have sole responsibility, the Secretary and Congress could have so stated in unmistakable terms. The absence of any such expression by the Secretary or Congress plainly demonstrates that this was not the result intended, particularly where Congress has provided no alternative remedy for injury. Given the special concern for grade crossing safety evidenced by Congress in the FRSA, *see* 45 U.S.C.A. § 433, it exceeds the bounds of credibility to "believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (Blackmun, J., dissenting).

C. Common Law Actions For Damages Are Preserved Under The Local Hazards Exception of 45 U.S.C.A. § 434.

Regardless of whether the Secretary, acting through the FRA, has promulgated regulations addressing the same subject matter as the legal duty underlying state tort law, the fact remains that states are still permitted to extend their common law to railroad operations at grade crossings under the local hazards exception to 45 U.S.C.A. § 434. This exception permits states to regulate rail safety even where the Secretary of Transportation acts with the intent to preempt the subject matter of state laws and regulations.[7]

For purposes of section 434, a local safety hazard is a hazard which: 1) is not statewide in character, and 2) is not capable of being adequately encompassed in Uniform National Standards. *National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir. 1976).

Under this criteria, railroad-highway grade crossings are local hazards by their very nature. They are confined to a circumscribed area and are not capable of being adequately encompassed by any national standards. Numerous factors such as area population, gross tonnage of traffic, frequency of use, slope, angle of intercept, surrounding vegetation or

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[7] *Amicus curiae* Association of American Railroads ("AAR") argues for a very narrow construction of the local safety hazards exception. Significantly, during congressional hearings on the FRSA the AAR urged the House Subcommittee on Transportation and Aeronautics to adopt a much narrower exception encompassing only "unique hazards of local origin." See *Subcommittee Hearings* at 84 (statement of Thomas M. Goodfellow, President, AAR), & 115 (Statement of Paul Rogers, General Counsel National Association of Railroad Utility Commissioners). This language was rejected by Congress as too restrictive. It would appear that the AAR is now attempting to achieve through this Court what it could not accomplish through its input into the legislative process.

development, sight distance, number of traffic lanes, and permissible automobile and train speeds may contribute to the ultra-hazardous nature of a particular grade crossing. The sheer number of these variables renders uniform national standards impractical. The MUTCD itself recognizes this:

> Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings.

MUTCD at § 8D-1.

Congress included the local hazards exception within 45 U.S.C.A. § 434 to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. *See* HOUSE REPORT NO. at 4117. Imposing a duty of reasonable care on railroads constitutes the only method by which a state may realistically attempt to address a problem which can manifest itself in so many diverse forms. Because the common law narrowly tailors the duties imposed upon a railroad to what is reasonable and prudent under the circumstances, such duties are truly local in nature and do not constitute "statewide standards superimposed upon national standards covering the same subject matter." HOUSE REPORT at 4117.

The Court of Appeals below dismissed the application of the local hazards exception as irrelevant because "a state does not legislate a duty of care in order to eliminate a local safety hazard." *Easterwood*, 933 F.2d at 1553 n.3. This rejection not only ignores the plain text of the FRSA, but is fundamentally inconsistent with the remainder of the opinion.

The Eleventh Circuit failed to distinguish between the positive enactments of state legislatures and the incidental effects of tort liability for purposes of preemption under §434. In the view of the Court of Appeals, "state law"

includes common law as well as enacted statutes. *Id.* at 1552 n.2, citing *San Diego Bldg. and Trades Council v. Garmon*, 359 U.S. 236 (1959). However, the Court gave no reason why state law encompasses common-law damage suits for purposes of § 434, but not under the local hazard exception. Amici suggest that there is no valid basis for this distinction.

Under this Court's opinion in *Cipollone*, *supra*, it is clear that the express provisions of § 434 must govern the extent to which state law is preempted. Because § 434 explicitly permits states to regulate local safety hazards, even after the Secretary has acted with respect to the particular subject matter, the preemption arguments of CSX should be rejected as contrary to the express language of the FRSA.

III. STATE COMMON-LAW CLAIMS BASED UPON NEGLIGENT OPERATION OF LOCOMOTIVES AT UNREASONABLE SPEEDS ARE NOT PREEMPTED BY FRSA.

Locomotive speed constitutes an integral element of grade crossing safety. Where a crossing is equipped with only a passive warning device (one not activated by the approach of a train, such as automatic gates and flashing lights), a roadway user must have sufficient "sight distance" to detect an approaching train and determine the appropriate response. Adequate sight distance permits the roadway user to see an approaching train in a sight line that will either allow the vehicle to pass through the grade crossing prior to the arrival of the train, or come to a safe stop prior to encroachment into the crossing area. The greater the speed of an approaching train, the greater the sight distance required to afford a motorist sufficient time to see the train and decide upon an appropriate course of action. *See* RAIL-HIGHWAY CROSSING STUDY (1989) at 5-7; RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK, Federal Highway Administration, U.S. Dept. of Transportation131-32 (Second Ed. 1986).

The federal government has never directly regulated locomotive speeds. Rather, maximum permissible train speed is set by the railroads solely as a function of the physical characteristics of the track. FRA regulations set forth six classes of railroad track and assign maximum operating speeds for each class of track based upon whether a train carries passengers or freight. 49 C.F.R. § 213.9. Track class, in turn, is determined only by such physical characteristics as ballast, geometry, track surface, gage, alinement, numbers of crossties, rail joints, and tie plates. *See* "Track Safety Standards" at 49 C.F.R. § 213 *et seq*.

Since the railroad determines the class of track to provide, it is the railroad alone which determines how fast their trains will travel over a given stretch of track. If a railroad desires to increase train speeds, it need only upgrade the physical characteristics of the track to a higher class.

Based upon the track class/speed regulations at § 213.9, CSX argues that the Secretary of Transportation has covered the subject matter of train speed and that state tort suits for failing to exercise reasonable care with regard to train speed are preempted under 45 U.S.C.A. § 434. Moreover, CSX argues that the Secretary specifically took grade crossing safety into account when setting the track class/speed regulations under § 213.9, so that tort liability under state law would conflict with a federal crossing scheme.

The Court of Appeals below agreed with CSX and rejected Mrs. Easterwood's arguments that the regulations at § 213.9 were only addressed to the physical condition of the track. According to the Eleventh Circuit:

> . . . Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives of the Secretary of the Treasury [sic]. Such guessing is inherently suspect. While

> Easterwood assumes the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailment.

Easterwood, 933 F.2d at 1554.

This analysis errs in several respects. First, the lower court found it "valid to assume" that the Secretary had coordinated national rail speed limits with adequate grade crossing warning devices and, absent a demonstration by Mrs. Easterwood to the contrary, preempted her cause of action. *Id*. This inappropriately reverses the well-settled presumption against preemption. Amici suggest that CSX bears the burden of demonstrating that Congress intended to preempt common law tort actions, and that the Secretary covered the subject of locomotive speed in a manner which encompassed reasonable speeds at grade crossings. The absence of such a showing compels the preservation of Mrs. Easterwood's tort claim.

The notion advanced by CSX and the Eleventh Circuit that the Secretary (FRA) took grade crossing safety into account in setting rail speed ignores the very text of the regulations at issue. The preface to 49 C.F.R. part 213, entitled "Scope of the Part", states:

> This part prescribes *initial minimum safety requirements* for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements

> of this part, *may require remedial action to provide for safe operation over that track.*

49 C.F.R. § 213.1 (emphasis added). The FRA clearly did not address itself to sight distance or grade crossing safety because it promulgated regulations which only address physical track conditions existing in isolation.

In addition to the plain language of § 213.1, the prefatory comments of the FRA in the Federal Register preceding the 1971 publication of 49 C.F.R. Part 213 reveal that "a series of variable factors such as population density near track, gross tonnage of traffic, frequency of use, and passenger operations" were *not* considered by the FRA, but were left to future regulations . 36 Fed. Reg. 20336 (1971).[8]

The regulations at 49 C.F.R. § 213 *et seq.* merely set forth technical standards for trackage. Accordingly, federal preemption under 45 U.S.C.A. § 434 only prohibits the adoption of differing or conflicting technical standards under state law. Thus for example, the fact that the FRA requires a minimum of 12 non-defective crossties for each 39 feet of track under 49 C.F.R. § 213.109 means that a state cannot require a greater or lesser number of ties. Similarly, a state could not develop its own track class definitions and assign rail speeds differing from those in § 213.9. However, nothing within these federal regulations prohibit the states from imposing liability under common law tort principles

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[8] FRA safety inspectors and railroad engineers frequently testify as experts in pending tort actions involving these issues that grade crossing safety is not considered when railroads set train speeds. *Amici* ATLA and TLPJ have lodged with the Clerk of the Court the depositions of Larry Chamberlain (Manager of Engineering Maintenance for Union Pacific Railroad) and Wallace Holl (retired FRA safety inspector) in the case of *Edwards v. Union Pacific Railroad Systems*, No. CJ-90-8195 (D.Okla. 1991) for the Court's reference and convenience. *See* Chamberlain deposition taken August 27, 1991, at pp. 7-36: Holl deposition taken December 10, 1991, at pp. 11-22.

Permitting tort liability to be imposed under state law does not interfere with the minimum track safety standards under 49 C.F.R. § 213 *et seq.* If a railroad operates its trains at speeds which are unreasonable and dangerous under local conditions, requiring the railroad to compensate a tort victim through an award of damages would not require the railroad to take any actions which differ from those imposed by federal regulations. Such damage awards would merely provide a financial incentive for the railroad to slow its trains down to speeds which are reasonable and prudent. This result, in turn, does not interfere with the national uniformity of track safety standards as established by the FRA, and ultimately advances rail safety.

Preempting state tort liability based upon excessive speed would immunize railroads from any consequences of their tortious behavior. Because railroads determine what class of track will be built, the only limits on train speeds would be the willingness of the railroads to provide for physical track quality. The hazards of such a scheme were recognized by the Eleventh Circuit in *Mahoney v. CSX Transportation, Inc.*, 966 F.2d 644 (11th Cir. 1992):

> Suppose the train that struck Mahoney was traveling at 59 miles per hour, at night, in a dense fog, and during stiff rain. If 60 miles per hour was allowed by federal law, CSX could not be sued for negligently excessive speed, even though the train's speed under these circumstances might be clearly unreasonable. ... Ordinarily, "compliance with a legislative enactment ... [should] not prevent a finding of negligence where a reasonable [person] would [have taken] additional precautions." *Restatement (Second) of Torts* §288C (1965).

966 F.2d at 646-647 (Birch, J.,concurring).

Similarly, a railroad willing to provide for class six track could run its trains through high volume urban grade crossings at 110 miles per hour irrespective of crossing signalization or sight distance. Such results were never intended by Congress. The practical result would be an increase in the deaths, injuries and property damage from railroad accidents which the FRSA was enacted to remedy.

As in the case with grade crossing signalization, even if the Secretary of Transportation intended the regulations at § 213.9 to cover the subject matter of safe train speeds at grade crossings, and even if the 45 U.S.C.A. § 434 could plausibly be read to preempt common law damage actions, states could still apply their common law through the local safety hazards exception. The numerous factors which necessarily affect sight distance render national speed limits impossible.

CSX cites an extensive list of cases rejecting application of the local safety hazard exception to claims based on train speed. Brief of Petitioner at n.22. However, these cases based their rejection of the local safety hazard exception on the fact that the language of 45 U.S.C.A. § 434 only refers to the "states" and not political subdivisions. In light of this Court's recent decision that a grant of regulatory authority to the states cannot be read to exclude similar authority in local political subdivisions because such subdivisions are "components of the very entity the statute empowers," these cases do not represent good law. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct 2476, 2478 (1991).

Moreover, Congress itself has recognized the authority of state and local governments to regulate train speeds. *See* 45 U.S.C.A. § 656 (employing the phrase "local safety hazard" with respect to speed limits enacted by state and local governments). Where local conditions render a railroad's chosen speed hazardous to the population, a state may not only enforce positive enactments such as speed limits, but may also impose a common-law duty of reasonable care.

If Congress or the Secretary of Transportation had intended to give railroads *carte blanche* to operate at any speed without regard to safety, one would expect some indication in either the legislative history of the FRSA or the FRA comments preceding 49 C.F.R. § 213. There is none. The presumption against the preemption of state law compels the conclusion that states may hold railroads liable for the failure to exercise reasonable care with regard to train speeds.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals in No. 91-790 should be affirmed and the judgment in No. 91-1206 should be reversed.

Respectfully Submitted,

Dale Haralson, Esq.*
Adam Levine, Esq.
HARALSON, KINERK & MOREY
28 South Stone Avenue
Tucson, Arizona 85701
(602) 792-4330
Attorneys for Amici Curiae
**Counsel of Record*

Roxanne Barton Conlin, Esq.
Jeffrey Robert White, Esq.
Association of Trial Lawyers of America
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

Priscilla Budeiri, Esq.
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C
1625 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 797-8600

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